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2012 COMEBACK AWARD WINNER INSPIRES MEMBERS WITH HER EMOTIONAL JOURNEY

By: Rudolf L. Massa, Esq.

Pictured from L to R: WPTLA Member Rudy Massa, Davanna's attorney; Lauren Vermilion of The Children's Institute; Davanna Feyrer, our 2012 Comeback Award Winner; Paul Lagnese, WPTLA President; and Sandy Neuman, WPTLA Treasurer and Comeback Award Committee Chair. Photo courtesy of Marty Murphy Investigative Photography.

The WPTLA recently honored Davanna Feyrer as the "Comeback Award" winner for 2012. The Comeback Award is presented annually to a client of a WPTLA member who has shown rare courage and determination in overcoming a serious disabling injury. The emphasis is on the client's efforts in overcoming the injury, rather than on a "cure" of the disability. Over 100 members of the WPTLA and numerous business partners were in attendance for dinner at the Duquesne Club, which served as the backdrop for a very emotionally powerful presentation regarding Davanna's story, including remarks from Davanna and her parents.

Davanna has a title for her own story: "What can happen in an instant." I first met Davanna at Children's Hospital in January 2009. A horrific truck accident had left her severely brain damaged and clinging to an earthly life. Tubes were coming out from her brain; her eyes, closed; her face, bruised; her body, motionless. Her parents flanked her with loving hands touching her face and talking to her. It was a moment that anyone who has ever loved a child would dare to even imagine.

When Davanna was transferred to The Children's Institute, there was still little hope. Her arms were contracted and her eyes were fixed in a stoic gaze. Still, her parents remained at her side with loving touch and words of encouragement. I spent Davanna's 11th birthday with her at The Children's Institute. It was only a few weeks after the crash. We all sang Girl Scout songs to her. She looked on from her wheelchair as though no one was there. Some of her doctors believed that she was locked in her body with no way to communicate.

But then, miracles began to happen. First, her eyes began working together and

Continued on Page 3

UPCOMING EVENTS FOR WPTLA

On **Tuesday, Feb. 11** we will hold a **2 hour CLE program** at the Koppers Bldg in Pittsburgh.

A **CLE Lunch 'n Learn** is scheduled for **Wednesday, Mar. 6** on Workers' Comp issues. This will also take place at the Koppers Bldg.

Wednesday, Mar. 13 is our next **dinner meeting** at the **LeMont Restaurant** in Pgh. We welcome our junior members to attend.

On **Monday, Apr. 1**, UPMC's Dr. Collins will present a **2 hour CLE program** at the Koppers Bldg in Pgh.

Thursday, Apr. 11 is our annual **Member's Only Meeting**, when we'll elect the next slate of Officers and Board of Governors. This meeting will be held at **The Priory** in Pgh.

Mark your calendar for **Friday, May 3** for our **Annual Judiciary Dinner** at **Heinz Field** in Pgh.

President
Paul A. Lagnese

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Association Office:
909 Mount Royal Boulevard, Suite 102
Pittsburgh, PA 15223-1030
Tel: 412-487-7644
Fax: 412-487-7645
email: admin@wptla.org
www.wptla.org

A Message from the President …

By: Paul A. Lagnese, Esq.

First, let me wish each of you a happy, healthy, and prosperous New Year. Since the last issue of the Advocate, we have some great developments that I would like to share with you.

First, in October, we had the most participants ever in the 12th annual President's Challenge 5K Race to benefit the Pittsburgh Steelwheelers. Because of that record participation, the total amount provided to the Steelwheelers was $30,500. Since WPTLA President now Judge Beth Lazzara started the race in 2001, WPTLA has donated over $286,000 to support the Steelwheelers.

In December, we held our annual Comeback Award Dinner at the Duquesne Club. Once again, we had the largest attendance ever for this special dinner honoring one of our clients who against all odds overcame injuries suffered as a result of the negligence of others. This year's recipient, 14-year-old Davanna Feyrer, was a true inspiration to all in attendance as we heard about her struggle to overcome the terrible injuries she suffered in a tractor-trailer accident a few years ago. Thanks to the help of our PR firm, Jampole, this year's Comeback Dinner received some very positive media attention from KDKA TV, who ran not just one but two separate stories about Davanna and the Comeback Award Dinner. For those of you who missed it, here is a link to one of the stories that ran on KDKA TV: http://pittsburgh.cbslocal.com/2012/12/04/local-girl-honored-as-comeback-kid-after-surviving-accident-against-all-odds/

Finally, in the last issue, I told you that WPTLA started a new Business Partner Program. We have approached various companies and vendors used by our members to get them to enter into a more formal working relationship with WPTLA. For an annual $5,000 fee, the Business Partners get a presence on our website, attendance to all of our dinners, an opportunity to make a presentation at one of our dinners, a full page ad in the Advocate, a full page ad in the Bi-Annual Member Directory, and access to our member list. I am pleased to inform you that as of the end of December we have obtained the following Business Partners:

Alliance Medical Legal Consulting
Covered Bridge Capital
FindLaw
Finley Consulting & Investigations
Forensic Human Resources
NFP Structured Settlements
Scanlon ADR Services
Stratos Legal
The Duckworth Group/Merrill Lynch

The Business Partners are providing us with financial support that helps us pay for our PR firm to get the media to cover our events like the Comeback Dinner. However, it is imperative that we in turn support our Business Partners. Please take the time to get know the services our business partners provide and, if you need any services they provide, please try to use them. If you get a call from one of them, please take the call. As Larry Kelly, the head of our Business Partner Committee, likes to remind us, this program and the financial benefit our organization receives will only work if it is a win for us **and** a win for the Business Partners.

As always, if you have any questions on anything relating to WPTLA please feel free to give me a call.

2012 COMEBACK WINNER … (*Continued from Page 1*)

then to track moving things. Then, she showed purposeful movement from her arms. Slowly, Davanna began to come back. There would be setbacks: pneumonia, cellulitis, infections, casting, bracing, testing, medication changes. Through it all, Davanna kept on progressing, as there was never an obstacle too great.

She finally went home after three months at The Children's Institute. Going home was another milestone for her. The wheelchair was no longer her sole means of transport; she was able to use her legs. Another milestone. Then it was back to school.

So, what can Davanna do now? She can ride a horse. She can attend Catholic school with her friends. She can dance. She can walk. She can roll her eyes at her father. She can laugh at a joke. She can wave her Terrible Towel and she can have a crush on a boy. It might be easier to ask what Davanna can't do.

In most cases a comeback is about coming back to where you were. In Davanna's case, it's all about going forward. WPTLA donates $1,000 to the charity of the Comeback Award winner's choosing. Davanna chose The Children's Institute to receive the $1,000 donation, as The Children's Institute played such a large role in helping Davanna move forward and overcome each and every obstacle placed in front of her.

I am proud and humbled to have been a part of her wonderful story. We, as trial lawyers, should be proud to honor those, like Davanna, who we fight for each day.

Pictured above, from L to R: Board of Governors Member Dave Zimmaro; Vice President Chris Miller; Varsha Desai of Alliance Medical Legal Consulting; Board of Governors Member Eric Purchase; Davanna Feyrer, President Paul Lagnese, presenting Davanna with an autographed photo of her idol, donated by Tony Mengine. Pictured below, from L to R: 2007/2008 Comeback Winner Karry Lee Coyer; Davanna Feyrer; 2006 Comeback Award Winner David Fleming; 2001 Comeback Award Winner Beckie Herzig; 2008 Comeback Award Winner Jennifer Quinio; Bill Goodman of NFP Structured Settlements; Past President Carl Schiffman; Board of Governors Member Jason Schiffman; Jennifer Schiffman; and Board of Governors Member Erin Rudert.

Photos are courtesy of Martin Murphy Investigative Photography.

In This Issue

Features

News

Columns

WHAT EMPLOYMENT AND PERSONAL INJURY LITIGATORS *ABSOLUTELY NEED TO KNOW* ABOUT SOCIAL MEDIA

*By: Richard N. Lettieri, Esq.**

It was Abraham Lincoln who said *"If we could first know where we are, and whither we are tending, we could then better judge what to do, and how to do it."*[1]

We are now seven years into an era officially started in 2006 by changes to the Federal Rules of Civil Procedure, defining the manner and methods by which electronically stored information (ESI) could be discoverable. For the past decade, ESI has primarily meant emails. We have now begun a new phase of e-discovery characterized not only by emails, but also social media.

No part of e-discovery is moving more rapidly, or is in greater flux, than social media. This is so for several reasons, but three predominate:

- The widespread use, incredible volume, and transient nature of the data on social media (i.e. Facebook, MySpace, Twitter, LinkedIn, YouTube, etc.).[2]
- The current immaturity of the technology and methods used to preserve, collect, authenticate and review social media data.
- The relative dearth[3] and inconsistency of case law in federal and state courts to guide litigators.

This current state of instability raises certain risks (and provides some opportunities) in the practices of employment and personal injury attorneys where social media data has proven to be especially valuable, if not decisive, in litigation.

This article will address the manner and means by which counsel can gain access to social media evidence, providing a succinct summary and "lessons learned" from the limited case law. We will then investigate the areas where social media has been used successfully in employment and personal injury litigation. Finally, we will review several technological social media challenges faced by employment and personal injury litigators, provide some practical insights and advise on how to address them, and outline where to seek resources to assist, when necessary.

How Do You Gain Access to Social Media Evidence?

Until recently, requesting documents in e-discovery usually meant seeking emails from opposing counsel. While emails still comprise a large part of e-discovery requests, increasingly employment and personal injury cases have seen a growing number of e-discovery requests involving social media. If emails were thought to provide a less formal, "less likely to be considered official" means of communication when it became popular a decade or two ago, authors of social media posts have proven to be even more spontaneous and frank. Envisioned initially as a purely social communication media, there was a written, although not necessarily legal, expectation of privacy conveyed by the social media service providers in the privacy settings by which subscribers could categorize the material on their social media site. While perhaps not intended to do so, these privacy settings have led (and still lead) many participants to believe that their communications and posts are "private".

Not surprisingly, privacy and confidentiality are usually cited as the primary reason for refusing discovery requests for social media. However, many courts have repeatedly ruled that discovery of potentially relevant evidence "trumps" privacy when it comes to social media for several reasons:

First, it is difficult to seriously argue that there is a legitimate expectation of privacy when the stated purpose of social media is to share information and experiences on the world-wide web, and at least a portion of the individual's social media site has a public section available to the entire planet. Second, while site owners may restrict access to portions of the site through "privacy settings", the designated "friends" who have access to this private information are not restricted from sharing it with others outside the circle of "friends" of the initial author. Finally, there are scores of social media provider employees who as "site operators" have access to all information on the social media site regardless of privacy settings.

However, as we know, there is not an absolute right to seek discoverable evidence in litigation. It must first be relevant to the issues and case for which it is being sought, or there must be a reasonable expectation that the discovery will lead to relevant evidence. In a number of cases, both federal and state, this burden has been met by information *Continued on Page 5*

* Richard N. Lettieri is an E-Discovery Counsel and principal at the Lettieri Law Firm, LLC, where he limits his legal practice to electronic evidence and e-discovery. He is a frequent author and speaker on e-discovery issues, a member of the advisory board of the American Academy of e-Neutrals, and an E-Discovery Special Master for the U.S. Court, Western District of Pennsylvania. You can learn more about his background, experience and practice at www.lettierilaw.com

[1] Abraham Lincoln, "House Divided" Speech, Springfield, Illinois, June 17, 1858

[2] As of 11-1-12, there are currently over 1billion users of Facebook alone.

[3] One survey of all federal and state cases through 2011 lists 689 total cases, with over half of these being criminal cases, with employment second and personal injury third. (5% of these cases are available on Westlaw or Lexis).

WHAT EMPLOYMENT … *(Continued from page 4)*

that was posted on the public portion of the social media site.

For example, in two federal employment law cases (*EEOC v. Simply Storage Management, LLC*[4] and *Held v. Ferrellgas Inc.*[5]), the courts permitted the requesting defendants access to social media sites. In the first case, the court limited the requested information by scope and timeframe, and in the second, the court limited the request to information that was reasonable and relevant (i.e. not requesting access to the entire sites). In the second case, a motion to compel was the means used to overcome the plaintiff's refusal.

However, in *Mailhoit v. Home Depot, U.S.A. Inc*.,[6] a recent California federal district court, under factual circumstances very similar to *Simply Storage,* the court refused to compel production of a party's Facebook posts and photos. This court commented that the discovery requests seeking information regarding the emotional state of a former employee in a wrongful termination case were "too broad" and did not provide "sufficient notice…..of what could be considered responsive material." The *Mailhoit* court also stated that the *Simply Storage* court "failed to give proper weight to the parties' ability to carry out the order." It will be interesting to see which approach other federal district courts and federal appeals courts follow in the months and years ahead.

At the state level, five Common Pleas cases from Pennsylvania counties have addressed this issue in personal injury litigation. In three of the cases, *McMillen v. Hummingbird Speedway, Inc.*[7], *Zimmerman v. Weis Markets, Inc.*[8], and *Largent v. Reed*[9], the courts each ruled that as a result of postings on the public portion of the social media sites, defendants were led to the reasonable belief that more relevant information might exist on the private portions of the sites. As a result, each court ordered the plaintiffs to provide their logon ID's and passwords, after the plaintiffs had initially refused to do so.

In the fourth case, *Trail v. Lesko*[10], complete access to Facebook by ordering logon ID's and passwords was denied, when the court ruled that neither party had established that Facebook might contain relevant evidence.

In the fifth case, *Arcq v. Field*[11], where no information was found on the public site to permit the defendants to reasonably believe that relevant information existed in other portions of the site, the court denied access. The court reasoned that while it was not an "absolute necessity" that material appear on the public portion of the site to warrant access to the entire site, it was necessary for the defendant to have some "good faith belief" that the private portion may contain relevant information.

These cases raise at least two important issues: 1) will some clarity develop as more federal district courts and federal appeals courts, as well as state appeals courts address these issues, and 2) under *Arcq v. Field,* what additional information might a party need to reach a "good faith belief" regarding the evidence on a social media site? The obvious answer seems to be the testimony received in interrogatories or depositions. If so, will this approach be adopted by federal courts as well?

What Are The "Lessons Learned" From These Cases?

First, always ask opposing counsel for access to social media sites. Perhaps they'll grant it, precluding your need for any of the following steps.

Second, based upon strategic considerations, your request can be for complete access by seeking the ID # and password to the site(s), or a discovery request limited to the issues of the case and a reasonable timeframe, allowing the client and opposing counsel to perform the search. The relevance and egregiousness of the evidence found on the public portion of the site will probably help determine which approach should be taken.

Third, if no relevant evidence can be found on the public portion of the sites, consider sworn responses to interrogatories or testimony in depositions to support your "good faith belief" that relevant evidence exists on the social media sites. The key here will be if such testimony exists.

Fourth, in all instances, make your discovery requests as specific as possible relative to scope and timeframe, and based upon *Mailhoit,* consider opposing counsel's ability to carry out the request.

Fifth, it is almost always unproductive to seek social media site information from social media providers, as they have perfected the use of the Stored Communications Act (SCA) to shield them from such requests.[12] To their credit, Facebook has developed a procedure to download site content, the utility of which we will discuss later in this article. Hopefully, other social media sites will follow Facebook offering similar services.

Gaining access to the social media evidence for use at trial in the manner prescribed above goes a long way to providing the

[4] EEOC v. Simply Storage Mgmt., LLC, 270 F.R.D. 430 (S.D. Ind. May 2010)
[5] Held v. Ferrellgas, Inc., 2011 WL 3896513 (D. Kan. Aug.31, 2011)
[6] Mailhoit v. Home Depot., 2012 U.S. Dist. LEXIS 131095 (C.D. Cal. Sept. 7, 2012)
[7] McMillen v. Hummingbird Speedway, Inc., No. 113-2010 CD (C.P. Jefferson, Sept. 9, 2010)
[8] Zimmerman v. Weis Markets, Inc., 2011 Pa. Dist. & Cnty. Dec. LEXIS 187 (Pa. County Ct. May 19, 2011).
[9] Largent v. Reed, 2009-1823 (Pa. Ct. of Common Pleas; Nov. 8, 2011)
[10] Trail v. Lesko, G.D. No. 10-0172249 (Allegheny C.P. July 2012)
[11] Arcq v. Fields, No. 2008-cv-2430 (C.P. Franklin Co. Dec. 7, 2011 Herman, J.)
[12] Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965, 971-72 (C.D. Cal. 2010)

Continued on Page 6

WHAT EMPLOYMENT *… (Continued from page 5)*

evidence that you need to win your employment or personal injury case. But there are still several tricky technical hurtles that must be overcome to have your evidence preserved, collected and admitted in court. Before we address these technical issues, let's review how social media, once obtained, can be successfully used to win your employment or personal injury case.

Using Social Media Successfully in Your Employment and Personal Injury Case

Pre-Employment

Let's say you represent a plaintiff who is filing a discrimination-in-hiring suit who claims that he was discriminated against in the hiring process on the basis of race. Since recent studies have shown that pre-screening the social media sites of potential hiring applicants by companies is a widespread corporate practice[13], it might be worthwhile to investigate the social media screening practices of your defendant. Did they visit social media sites in advance of the hiring interview? Did they visit the public portion of these sites, or request the ID and passcodes from the applicant to access the entire sites? If so, did they inform the applicant of this practice?

Once access to the social media sites was gained, did the hiring manager do these searches, or did someone else do the searches and provide a report to the hiring manager? If the searches were not done by the hiring manager, did the report mention the race of the applicant? The answers to any of these questions may provide the factual basis to support your claim.

That's not to say that corporations may not screen prospective hiring candidates to select interviewees or determine to whom to extend offers. What it does mean is that certain steps must be taken to ensure that the screening is lawful and not used as a means of discrimination.

For example, a lawful screening of social media will ensure that:

- Someone other than the hiring decision-maker performs the social media site reviews and prepares a report for the hiring manager with only appropriate information included in it.
- A record of the process used to create the report should be completed to include: the person performing the searches and the social media sites visited; the date the report was created and by whom.
- Disclosure is made to the applicant that the public portion of their social media sites may be visited as part of the hiring process. Based upon recent developments, seeking ID's and passwords from applicants to gain full access to the entire sites should be avoided.
- Applicants are notified of adverse action taken as a result of the social media report (as so ruled by the FTC).[14]

During Employment

Most courts have agreed that company monitoring of the social media sites of their employees is appropriate, if the monitoring is in compliance with a clearly defined corporate social media policy, and if the monitoring is performed to ensure that the use of social media sites does not interfere with work.

These social media policies must provide clear guidance on the use of social media during working hours, include obvious prohibitions against discrimination and harassment, and ensure confidentiality of corporate information. Furthermore, employers must clearly indicate that they intend to monitor computers and social network sites during working hours. Companies are advised to have employees acknowledge that they have read these policies, and they should review and update them periodically.

It should be noted that even when taking all the above precautions, some companies have had trouble with the NLRB over their interpretation of what is considered "inappropriate behavior" when using social media. Griping about a boss or using profanity may be permitted, if these complaints are made as part of what is considered "concerted activity" that is done on behalf of, or in conjunction with other employees.[15]

Interestingly, company attempts to coerce employees into providing their ID's and passcodes to their social media sites to provide this employee monitoring have failed under a growing trend by a number of states to pass privacy legislation prohibiting this practice.[16]

After Employment

After employment issues relative to social media usually involve ownership. Who owns the contacts gained through the use of the social media sites? Do employees own this information and have a right to take it when they leave the company, or is the information owned by the company and attempts by employees to take it upon departure a misappropriation of trade secrets? How much effort was taken in advance by the company to safeguard the information seems to be the determining factor used by most courts in deciding the ownership

[13] See http://mashable.com/2011/10/23/how-recruiters-use-social-networks-to-screen-candidates-infographic/

[14] See http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre36.shtm

[15] *"Social Media Do's and Don'ts: An Anatomy of Recent National Relations Board Reports and Cases",* Claudia M. Williams, Esq. Rhoads and Sinin, LLP, PBI No. 2012-7345, and see http://www.jdsupra.com/post/documentViewer.aspx?fid=a32b9413-bbcb-4548-8eaf-fe9d3f88334d

[16] *"Labor: Legislation Seeks to Ban Employer Use of Employee Social Media Passwords",* Inside Counsel, 9-3-12, by Mark Spognardi, p. 2.

Continued on Page 7

WHAT EMPLOYMENT … *(Continued from page 6)*

issue.[17]

For example, factual determinations like: if the data in question could have been easily acquired by other means (i.e. a Google search); was the data password protected; were employees required to sign a confidential or non-solicitation agreement relative to this information at the time of employment; was the data restricted to use by only employees and business partners; are all factors in making the ownership of the data determination. To the extent and degree that employers have sought protections of this type, their claims of misrepresentation of trade secrets by departing employees have generally been supported by the courts.

Social Media in Personal Injury Cases

Most personal injury lawyers are now aware of the incriminating admissions made on social media sites that have torpedoed scores of personal injury claims. Some examples:

- The plaintiff claiming an inability to work as a result of an injury, engaged in dancing, swinging on a swing and enjoying various water sports in pictures posted on her social media site.[18]
- The employee who injured his leg in a forklift accident who testifies that he never wore shorts because he was embarrassed by the scar on his leg from the accident, who is seen in photos on his public portion of MySpace with shorts and the scar visible.[19]
- Or the particularly crass plaintiff who has lost his wife in a terrible accident in the wrongful death suit wearing a t-shirt saying "I love hot Moms" on Facebook.[20]

These, and other careless social media posts, have caused many personal injury lawyers to advise clients that:

- Prior to filing a lawsuit they need to remove any objectionable posts to their social media sites that could hurt their case, reminding the potential client that social media material is usually discoverable.
- They ought to refrain from any posts regarding the people or issues in the trial throughout its duration.
- They need to refrain from "friending" anyone they don't know, because insurance adjusters, investigators and others may try to get incriminating information off their social media sites through fraud and deception.
- They need to be aware of what information "friends" may posting about them and request that no posts be made re garding them for the duration of the trial.

[17] Eagle v. Morgan, 11-4303 (E.D. PA. Dec. 22, 2011)
[18] Thompson v. Autoliv ASP, Inc., et al., 09-cv-01375-PMP-VCF (D. Nev.; June 20, 2012)
[19] Id.
[20] Lester v. Allied Concrete Company, No. CL.08-150, CL.09-223 (Va. Cir. Ct. Oct. 21, 2011)

Investigative Tool to Select Jurors and Impeach Witnesses in Employment and Personal Injury Litigation

Using social media successfully by employment and personal injury lawyers at trial includes the pre-trial jury selection process. By searching the social media sites of potential jurors in advance, lawyers can identify hidden biases or prejudices candidly displayed through comments, pictures, or videos on the site, then question the potential juror more thoroughly on certain topics to disqualify them in certain types of cases. Additional attributes found to be favorable or unfavorable in jurors based upon prior experience (like leadership ability) can also be identified.

Furthermore, information and pictures posted on social media sites can be used at trial to impeach the credibility of witnesses. Sometimes social media posts can be found that directly contradict or call into question the veracity of the sworn statements of witnesses. Contradictory facts or opinions of witnesses made on their social media sites can effectively damage or destroy witness testimony. Witnesses may also have already admitted facts on social media sites that their later sworn testimony contradicts. A passenger in a car who posts, "I have just been in a car accident this morning. I've been telling Pete to not drive and text at the same time for months. Today it caught up with him and it almost killed us both", has significantly restricted his ability to testify that the driver was not at least partially responsible for the accident.

Privacy and confidentiality are usually cited as the primary reason for refusing discovery requests for social media. However, many courts have repeatedly ruled that discovery of potentially relevant evidence "trumps" privacy when it comes to social media.

Overcoming Technological Challenges Involving Social Media

As mentioned earlier, social media provides several tricky technological hurdles (different from email and other sources of ESI), that can present unique problems, for the litigator in employment and personal injury cases.

Preservation

One of the landmines of social media e-discovery is preservation. If it is difficult to preserve millions of emails in even a small employment case, imagine how difficult it is to preserve emails, pictures and video on multiple social media sites whose servers may be controlled by a social media service provider.

The good news is that although the data resides on servers that may not be controlled by the individual

Continued on Page 8

WHAT EMPLOYMENT … *(Continued from page 7)*

or their company, the account and therefore the data, for the most part, is controlled by the person who has control of the account profile. Therefore, when a preservation letter goes out at the beginning of litigation, it is sent to opposing counsel and their client with instructions to preserve and not delete social media content. In the best of circumstances, this is no small task given the transient nature of social media data.

Facebook recently made this preservation effort less ominous by the creation of the Download Your Information (DYI) function, which permits an account owner to download the entire site content at that moment in time by executing four easy commands that take about a minute. It then takes Facebook approximately 10-20 minutes to perform the function and return the site contents to the account owner in a zip file attached to an email. As convenient as this sounds, this approach is not without shortcomings. First, the file will not copy any information that has been deleted prior to the copy being made, nor does it provide a means by which any deletions can be detected in the received file. Second, the procedure does not capture the application program interfaces (API's) required to capture the metadata or the hash values that can be so important to proper authentication.

Even with these limitations, requesting that opposing counsel and his client use this capability from Facebook and other social media providers that develop a similar capability, may provide valuable data that might be otherwise lost, if a forensic collection cannot be made.

To stress the importance of timely and accurate preservation of social media content, your request to preserve social media content in your preservation letter to opposing counsel and their client might include a reference to a recent Virginia state case[21] where counsel instructed a paralegal to tell their plaintiff client to "clean up" his Facebook profile that had some potential damaging pictures and posts on it after the case had been filed. Later the client was told by counsel to de-activate his profile. Based upon this spoliation of evidence, the attorney was ordered to pay over $542,000, and the plaintiff $188,000 to the defendant. If, after a lawsuit has been filed, counsel or his client has any thoughts of altering Facebook, or other social media content prior to downloading, this should dissuade them.

A good preservation letter places opposing counsel and their clients on notice to preserve and not alter or delete information on all their social media sites, pending the court's decision on access to them in response to your discovery requests.

Collection

Using the proper method of collection of social media data is critical because unlike email, where securing metadata is determined by the selection of the format in which the emails are produced (i.e. Native format that includes metadata, as opposed to PDF or TIFF formats where metadata is not included unless specifically requested as separate load files), metadata for social media is captured during the collection process. By capturing the application program interfaces (API's) of the social media at the time of collection, the metadata is also captured.

If other methods of collection for social media are used (i.e. "screen shots" or data collected from 1st generation web crawlers), the metadata is not collected and authentication becomes more difficult, especially if there is insufficient testimony and limited circumstantial evidence.[22]

As with other forms of electronic documents, metadata in social media data can include *create time, unique ID # of the person making the post, the device from which the post (or entry) was made, and a log report indicating every time a page was touched.*[23] This information can be pivotal in authenticating whether a particular person is the author of a post. Therefore, if any of the metadata items above are important to your case, a decision to pay for a forensic collection that will include the social media metadata and hash values, as opposed to a do-it-yourself "screen shot" collection that does not collect the metadata, is probably worth the additional expense.[24]

To illustrate this point, metadata used to identify the device from which a post was made could be relevant in a personal injury case where a person has commandeered the ID and passcode of your client and "spoofs" or prefabricates a damaging post. Metadata might be the only way in which your client might be shown not to have made that post.

Authentication

As with other areas of evolving e-discovery law related to social media, there is currently no established standard in federal or state court regarding the authentication of social media. However, to date, the rules of evidence for admissibility for paper documents have proven to be applicable to the special demands of electronic evidence and social media.

In the landmark federal case, *Lorraine v. Markel American Insurance Company*,[25] Magistrate Judge Grimm from the Maryland Federal Court indicated that authentication of electronic evidence is a two-step process:

[21] Id.

[22] "Overcoming Potential Legal Challenges to the Authentication of Social Media Evidence", John Patzakis, 4- 2-12
http://articles.forensicfocus.com/2012/04/02/

[23] "Social Media and Your e-Discovery Strategies", 11-21-12,
See http://www.techrepublic.com/blog/tech-manager/social-media-and-your-ediscovery-strategies/8051

[24] For an excellent discussion involving preservation, collection and other evolving legal and technical issues associated with social media in e-discovery, please see "Primer on Social Media", The Sedona Conference, 10/2012

[25] Lorraine v. Markel American Insurance Company, 241 F.R.D. 534 (D. Md. May 4, 2007)

Continued on Page 9

WHAT EMPLOYMENT … *(Continued from page 8)*

1. Sufficient foundation must be laid to indicate that the evidence is what it purports to be
2. A jury must then determine if the electronic evidence had been fabricated or tampered with

Underlying this approach is whether or not the specter of fabrication is a bar to authentication to be decided by the court, or a factual question to be decided by the jury.

A good preservation letter places opposing counsel and their clients on notice to preserve and not alter or delete information on all their social media sites, pending the court's decision on access to them in response to your discovery requests.

How much evidence is enough to satisfy the foundational requirement that the evidence was sent from the person who owns the social media profile and has not been prefabricated? In *Lorraine*, referenced above, both metadata and file level hash values were deemed sufficient circumstantial evidence to establish authenticity.

In another federal case, *United States v. Lanzon*[26] (a criminal case), the 11th Circuit Court of Appeals in 2011, using the rule of evidence that the "proponent need only present enough evidence to make out a prima facie case that the proffered evidence is what it purports to be", the court allowed authentication of social media evidence on the testimony of a single participant. In other federal and state cases, additional evidence has been required to authenticate social media evidence.[27]

In *People v. Clevenstine*[28] (N.Y. Superior Court, 2009) (another criminal case), testimony from several people was required to overcome a presumption that social media evidence may have been tampered with. In that case, circumstantial foundational evidence was provided by:

- Testimony from two victims who had exchanged messages with the defendant
- An investigator who testified that he had retrieved messages from the hard drive of the victims
- Testimony from the legal compliance officer at MySpace, stating that the accounts created by the victims and the defendant had exchanged messages
- Testimony from the defendant's wife who actually viewed the messages on her husband's MySpace account on their home computer

Ideally, testimony from the purported creator of the social media under oath regarding whether he/she created the site profile and added the post in question is the best authentication.

Other ways to provide circumstantial foundational evidence to authenticate social media can include:

- Metadata and hash values resulting from a forensic collection can provide key circumstantial data to authenticate a social media item.[29]
- Identification of distinctive characteristics of the post, like regularly misspelled words, punctuation, appearance (font style) and other unique print, taken in conjunction with the circumstances.

As the *People v. Clevenstine* court stated, even with all the circumstantial evidence that was presented, it was still possible that someone else accessed the defendant's social media account and sent the messages under his name. What most of the cases acknowledge is that while this will always be the case, the more circumstantial evidence provided makes a positive factual jury determination more likely.

Review

Review of social media that has been collected in sequential, lineal form, and includes text, photos and videos, can be very difficult and time consuming to review. Professional e-discovery suppliers can organize this collected social media data to maximize efficiency of review, saving review time and money.

Conclusion

The law related to social media is complex and evolving rapidly. The pervasiveness of social media during all stages of employment and personal injury litigation, as well as its widespread use, incredible volume and transient nature, have ushered in a new phase of e-discovery, where the evidence gained from social media can be the decisive factor in employment and personal injury litigation.

We learned that gaining access to social media is possible if the data is relevant. Asking for the data is the first step. If denied, the courts have ruled that searching for data on the public portion of the social media sites often provides a "good faith belief" that relevant data will be found on the other portion of the site and have subsequently permitted access to the entire site on that basis. Testimony received in interrogatories and/or depositions has also been used to provide the "good faith belief" required for the court to grant access.

[26] United States v. Lanzon, 639 F.3d 1293, 1298–99 (11th Cir. 2011)
[27] *"Preserving and Authenticating Social Media: Why Hitting "Download" Isn't a Defensible Process and May Result in the Exclusion of Valuable Electronic Evidence",* Joseph Decker, Esq. and Susan A. Ardisson, Esq., July 24, 2012, www.bit-x-bit.com
[28] 891 N.Y.S. 2d. 511, (N.Y.App. Div. 2009)
[29] John Patzakis, s*upra* fn 19

Continued on Page 10

WHAT EMPLOYMENT … *(Continued from page 9)*

We also learned that social media data is pervasive before, during and after employment and personal injury litigation. It is used to screen potential applicants, monitor employee behavior once hired, and determine ownership of data when employees depart. It is also being used to counsel clients before litigation, select jurors, and impeach witnesses.

Finally, we learned that to take full advantage of the decisive nature of this potential evidence, tricky technical issues must be overcome to ensure authenticity and admissibility. Although legal standards are not yet established for social media, a handful of federal and state cases are providing valuable guidance on key issues for practitioners.

The technical challenges require that lawyers get the help they need in this new phase of e-discovery, especially in the preservation, collection, authentication and review of social media. This means that large firms will probably rely more heavily on their in-house, e-discovery practices that they have created over the past several years[30] , to counsel and advise them; and that mid-to-small firms will retain E-Discovery Counsel on an "as-needed" basis to offset the large firm ESI "skill gap" that has developed over the past several years and continues to grow.

If there is any good that we can expect from this next phase of e-discovery involving social media, it may be the opportunity and impetus that it provides to mid-to-small firms as they attempt to close the ESI "skill gap" with larger firms and establish ESI parity.

[30] *Mid-to-Small Law Firm Alert: Overcoming the Growing E-Discovery "Skill Gap"*, The Advocate Quarterly publication of the Western Pennsylvania Trial Lawyer Association, Winter, 2012

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PICTURES & PROFILES QUESTIONNAIRE

Name: James J. Ross

Firm: Bowers, Ross & Fawcett, LLC, Ambridge, PA

Law School: Ohio Northern University

Year Graduated: 1980

Special area of practice/interest, if any: Plaintiff's personal injury and criminal defense

Most memorable court moment: $3.2 million award in a premises liability action in the Court of Common Pleas of Allegheny County in 2007, with Western PA Trial Lawyers' member Dave Zimmaro as co-counsel

Most embarrassing (but printable) court moment: Too many to mention

Most memorable WPTLA moment: All of our Comeback Award Dinners

Happiest/Proudest moment as a lawyer: Swearing-in ceremony as Assistant United States Attorney for the Western District of Pennsylvania in 1984

Best Virtue: Hard work

Secret Vice: Blowing off steam with a cold beer or glass of good wine

People might be surprised to know that: I am full-blooded Italian

Favorite movie (non-legal): Remember the Titans

Favorite movie (legal): The Verdict

Last book read for pleasure, not as research for a brief or opening/closing: The Killer Angels

My refrigerator always contains: Prosciutto ham and good cheese

My favorite beverage is: Moosehead or Peroni beer

My favorite restaurant is: Aviva Brick Oven, Wexford, PA

If I wasn't a lawyer, I'd be: The most interesting man in the world and drink Dos Equis (stay thirsty my friends)

COMP CORNER

By: Thomas C. Baumann, Esq.

EXCELLENT COMPENDIUM OF CASE LAW REGARDING SOCIAL MEDIA DISCOVERY

Recently, Judge Wettick of the Court of Common Pleas of Allegheny County has issued an opinion that concisely summarizes both Pennsylvania and other jurisdiction case law regarding discovery of Facebook content. The case is *Howard Trail, individually and as administrator of the Estate of Jessica Trail, deceased, Sue Trail, Tammie Grice, individually and as administrator of the Estate of William Grice, deceased, Michael Trail, and Amanda Delval v. Timothy Lesko and Pittsburgh Lodge No. 11 Benevolent and Protective Order of Elks, t/d/b/a B.P.O.E. Pittsburgh Lodge 11,* No. GD-10-017249. (Hereinafter referred to as *Trail.*)

In *Trail*, Judge Wettick was confronted with motions from Defendant Lesko seeking access to Plaintiff, Michael Trail's Facebook profile as well as a motion from Michael Trail seeking access to Lesko's Facebook profile. Judge Wettick considered both Pennsylvania and federal case law regarding these requests. Judge Wettick reviewed nine Pennsylvania cases, including *McMillen v. Hummingbird Speedway, Inc.,* 2010 WL 4403285, No. 113-2010 CD (Jefferson C.P. Sep. 9, 2010) (Foradora, P.J.) and *Martin v. Allstate Fire & Casualty Insurance Co.,* Case ID 1104022438 (Phila. C.P. Dec. 13, 2011) (Manfredi. J.) All but one of the cases turned on the issue of whether or not the public Facebook profile revealed information which would reasonably suggest that relevant information likely existed in the private portion of the Facebook pages.

The only case that did not seem to follow the threshold requirement was *Gallagher v. Urbanovich,* No. 2010-33418 (Montgomery C.P. Feb. 27, 2012) (Carpenter, J.). The Plaintiff in that case was injured in a soccer game. He sought to obtain the Defendant's login and password information regarding his Facebook pages. Apparently, nothing was demonstrated in the motion to suggest relevant material would be filed in the private section of the web pages. Nevertheless, the Defendant was ordered to provide Plaintiff's counsel access to the entire site for a seven-day period.

Judge Wettick ultimately described the Pennsylvania Courts as requiring…"the need for a threshold showing of relevance prior to discovery of any kind and [the Courts] nearly all required a party seeking discovery in these cases to articulate some facts that suggest relevant information may be contained within the non-public portions of the profile."

Judge Wettick goes on to review other state jurisdictions along with federal jurisdictions. He noted congruity between other jurisdictions and Pennsylvania where "fishing expeditions" are to be discouraged. He noted that other jurisdictions have sought a "middle ground" between complete denial of discovery and complete disclosure. Among the remedies fashioned include reviewing a limited period of posting to the profile covering a relevant time frame.

Workers' Compensation practitioners are facing more requests for discovery regarding Claimant's Facebook pages. Private investigators routinely seek out information regarding social media as part of their activities on behalf of insurance companies. Defense counsel are more often than in the past seeking private information from social media sites. The opinion in *Trail* is useful in resisting fishing expeditions. Claimant's attorneys should force defense counsel to articulate what relevant information exists in the public profile that would justify access to the private profile. Pennsylvania case law rather strongly supports the proposition that without such indicia, access to the private profile should be denied.

MARK YOUR CALENDARS: UPCOMING CLE PROGRAMS

Eve Semins Hagerty, Esq. and Laura D. Phillips, Esq.

On **Monday, Feb.11,** we are scheduled to host a 2 credit program in the Koppers Bldg, Pgh. Details are still pending.

On **Wednesday, Mar. 6,** workers' comp is the focus of a Lunch 'n Learn. Seasoned attorneys from both sides of the aisle will be discussing the nuts and bolts of the practice, as well as a specific focus on aggravation of pre-existing injuries and settlement value of cases. This will be a one credit program in the Koppers Bldg in Pittsburgh.

On **Monday, Apr. 1,** Dr. Michael Collins from UPMC Sports Medicine will teach our members about the science behind traumatic brain injury and its effects on our clients, as well as how to most effectively discuss these injuries with a jury. This has been an extremely popular program in the past, so early registration is strongly encouraged. (2 substantive credits, Koppers Bldg, Pittsburgh)

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PENNSYLVANIA VOTER ID LAW

By: Stephen P. Moschetta, Esq.

"The American system of democracy is founded on the concept that every citizen has the right to vote [and] to know that their vote is counted." U.S. Senator Barbara Mikulski. In keeping with that concept, I and other lawyers across the state volunteered last month with the non-partisan group Election Protection / Lawyers' Committee for Civil Rights under Law. We were on "standby" on November 6th to go to court to seek an appropriate order if voters' rights were being infringed. I have volunteered before, including the 2000 Election where constables were deployed to certain polling precincts in Washington County to "keep the peace." Even then, I was never called to address a problem.

That changed on November 6, 2012. Actually, the change occurred in March 2012, when the General Assembly passed Act 18, the new Voter ID Law. In response, Viviette Applewhite, et al., filed a lawsuit in the Commonwealth Court of Pennsylvania to overturn the law. The plaintiffs alleged that Act 18 unconstitutionally deprived citizens of the right to vote and requested an injunction blocking enforcement of the law before November's election. Judge Robert Simpson, who wrote the opinion for the court, declined the request. But following an appeal to and remand order from the Supreme Court of Pennsylvania, Judge Simpson issued a partial preliminary injunction on October 2nd that essentially maintained the same photo ID rules for the General Election as were in place for the Primary Election earlier this year.

The trouble was that the Commonwealth and its agencies continued to disseminate outdated and incorrect information about the need for photo ID on Election Day. So on October 19, 2012, Mrs. Applewhite, et al., filed another petition asking Judge Simpson to order the Commonwealth to stop disseminating false information about the need for photo ID. The petition alleged, among others, that thousands of Pennsylvania seniors had received a mailing from a program administered by the Commonwealth's Department of Aging that included a Department of State card saying "*Voters are required to show photo ID on Election Day*."

Meanwhile, the Pennsylvania Department of State had sent placards with the same incorrect information to election offices and polling precincts. Most precincts posted the placards but removed them when asked by non-partisan poll monitors. In place of the placards, however, many poll workers created their own signs that contained false information that violates 25 P.S. §3050(a.2).

So on Election Day, my telephone started ringing at 8:00 am and didn't stop until 5:00 pm. I spent most of the morning calling the Director of Elections, Larry Spahr, and faxing letters to him about misleading signs/statements by precinct workers. Mr. Spahr was very helpful and responsive, even personally calling one precinct about an issue. However, one man can only do so much; and the problems continued throughout the day.

In one instance, when a young woman finally reached the front of the line (30 minute wait) and read the sign ("have your photo ID ready"), she threw up her hands in exasperation and started out the door. Fortunately, the voter behind her in line informed her that she didn't need photo ID. The young woman got back in line and voted. Some would say this is no big deal. However, she went to vote on her way to work the 4:00 pm to midnight shift and couldn't leave work to return and cast her ballot.

In sum, confusion about the voter ID requirements made for a busy day for attorney volunteers with Election Protection throughout the state. For me, though, it was time well spent.

SPONSOR SPOTLIGHT

NAME:
Hon. Eugene F. Scanlon, Jr. (Ret.)

BUSINESS/OCCUPATION:
Scanlon ADR Services
Mediation,
Arbitration and Early Neutral Evaluations

FAMILY:
Wife- Sheila, retired lawyer and now homemaker
3 children- Brian, (Plaintiff PI lawyer hoping to relocate to PGH from Pensacola, FL soon with my two grandchildren); Brad (Restaurant Manager in PGH); Maggie (High School student)

INTERESTS:
Golf and Musical Theatre

PROUDEST ACCOMPLISHMENT:
Raising 3 quality children with no major catastrophes…yet

FUNNIEST/WEIRDEST THING TO HAPPEN TO YOU ON THE JOB:
One day as part of a child support contempt proceeding in Family Court, a contemptor claimed to be doing much better and that he had gotten clean and sober and just needed a chance to get out of jail, get a job and would prove himself. When asked what his clean date was, he responded "Put me down for NEXT MONDAY"

FAVORITE RESTAURANT:
Clifford's in Evans City

FAVORITE MOVIE:
Hoosiers

FAVORITE SPORTS TEAM:
Pitt Basketball Team

FAVORITE PLACE(S) TO VISIT:
St. Simon's Island, Georgia
New York City

WHAT'S ON MY CAR RADIO:
93.7 The Fan

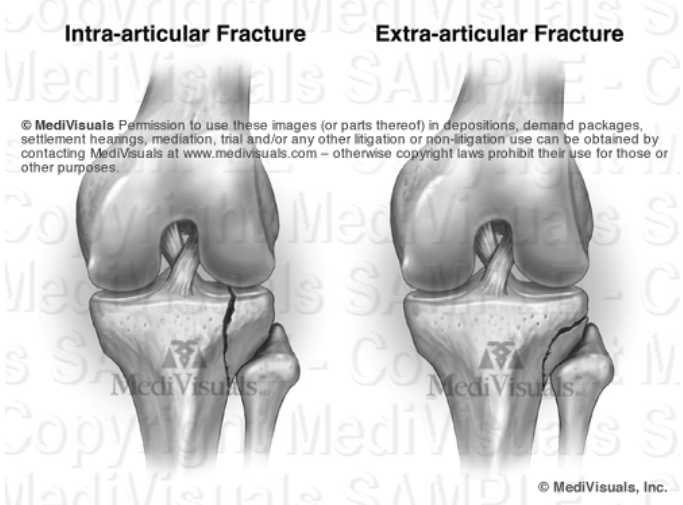
PEOPLE MAY BE SURPRISED TO KNOW THAT:
When I was a high school senior my dream school was Notre Dame. Got rejected, went to PITT. All who know me now know only how I despise them. ROLL TIDE

SECRET VICE:
Drinking Milk from the container

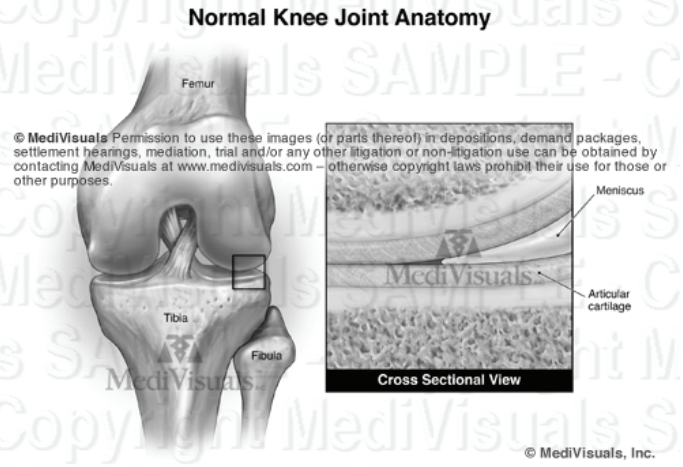
INTRA-ARTICULAR FRACTURES EXPLAINED

By: Robert Shepherd MS, Certified Medical Illustrator,
Vice President and Director of Eastern Region Operations, MediVisuals Incorporated

Intra-articular fractures are simply fractures that involve a joint space (see below figure). While intra-articular fractures appear very similar to those that do not involve a joint space (extra-articular fractures), intra-articular fractures are significantly more serious because they are associated with a much greater incidence of long-term complications.

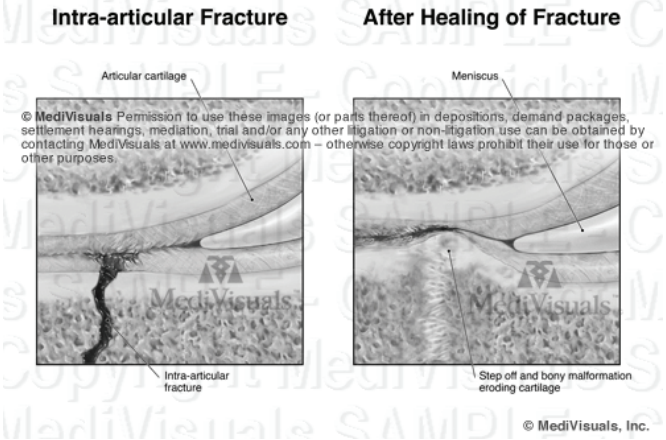


In order to appreciate why intra-articular fractures can be so problematic, a fundamental understanding of a typical joint is helpful. The following images show a knee joint. With the exception of a meniscus, almost all moveable joints are similar to the knee joint in that the joints are lined with a thick, shock-absorbing articular cartilage adherent to smooth, bony surfaces that allow pain-free movement.

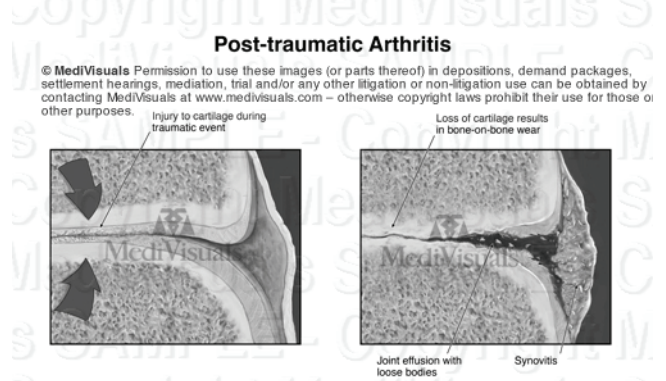


When a fracture involves the articular surface of one or more bones of a joint, the articular cartilage and smooth articular surface of the bone are disrupted. In order for joints to have the best chance of proper joint function after healing, physicians go to greater effort to make sure the bony surfaces are properly aligned and that the joint is properly immobilized than they would with a similar fracture that is extra-articular.

Even with the best fracture alignment and joint immobilization, subtle disturbances in the joint surface and the natural bone reformation that take place during healing can result in uneven joint surfaces and injury to the overlying articular cartilage (see the below illustration). Because of the abnormalities of the injured and healed joint surface, natural movement of the joint can also damage the articular cartilage of the opposing joint surface. Over the course of time, these injuries self-perpetuate and may necessitate arthroscopic debridement, chondroplasty or even joint replacement.



It is also important to realize that a fracture needs not enter a joint to result in injury to the articular surfaces and begin the self-perpetuating post-traumatic breakdown of the joint surfaces (post-traumatic arthritis). As shown in the below illustrations, joint trauma without a diagnosable fracture of any type can injure the smooth, shock-absorbing articular cartilage, with or without microfractures of the underlying bone. This can result in partial or total loss of the articular cartilage and in uneven "bone-on-bone" articulation that severely decrease range of motion and result in debilitating joint pain.



POLLING PLACE PROBLEMS

By: Tim Riley, Esq.

My service as a "Legal Observer" volunteer for Obama for America at a polling place in downtown Erie convinces me there is a crying need for election reform in Pennsylvania- but not of the type on which our elected officials have been focusing. The problem we face isn't voter fraud, but voter disenfranchisement. Our antiquated election system functions in a manner that prevents citizens from voting rather than ensuring they will be able to vote.

The first problem we experienced was when a voter from another district asked for our help in determining where he should vote. He and a group of about twenty other voters had showed up at 7:00 am at the polling place where they had historically voted only to find it locked up. No signs had been posted to alert voters to the address of the new polling place for that district. The others left when they couldn't get in and didn't know where to go. How many votes were lost across Pennsylvania because polling places changed and voters didn't know where they should go to vote? When polling places are changed, shouldn't local election officials be required to post notices at all former polling places notifying voters where their new polling place is located? Numerous other voters came to our polling place throughout the day trying to determine where they should vote. Unless they were given correct advice about where to vote, were able to travel there and were permitted to vote once they got there, their votes weren't counted.

Other problems soon surfaced with voters who claimed to have recently registered but who weren't listed in the "book" provided by the county election office to the Judge of Election at our polling place. None of the election officials at our polling place had a computer because online access to the county's voter registration office and database isn't available. When a voter's name didn't appear "in the book" but the voter claimed to be registered, the Judge of Election was required to call the county election office. Often, the telephone at the county election office was busy or went unanswered, resulting in a lengthy wait for the voter. More than once, when the Judge of Election was able to speak with someone at the county election office, the voter's registration was eventually found on a "supplemental list" that the county elections office had but the Judge of Election did not. On several occasions, when the Judge of Election wasn't able to get through to the county election office, she accepted my offer to call the OFA hotline for help with registration issues. About half of the time, the OFA hotline was able to confirm that the voter was registered Sometimes the OFA hotline advised that the voter was registered, but in a different county. Out-of-county registration information wasn't provided by the county election office. Unless the voter was "in the book" at our polling place, the Judge of Election insisted that the only way the voter could vote was by filling out a provisional ballot. Voters whose registration has been confirmed should be entitled to vote "on the machine" and should not be required to vote by provisional ballot, which are subject to being disallowed.

A few people showed up who wanted to both register and vote, unaware that the deadline for registering had passed. Assuming they could have presented the proof required to register, why shouldn't they be permitted to register at the polls and then vote? I can go to a notary public and instantly register my car or boat or trailer online. What's so different about registering a voter?

While we're at it, why don't we permit online voting? We live in a time when a significant and growing portion of our banking, bill paying and purchasing is securely transacted online. If we are serious about encouraging citizens to vote, surely a secure online voting system is capable of being designed and implemented.

Our polling place was busiest for the first two hours the polls were open in the morning, between noon and 1:30 pm, and after 5:00 pm. Why do we require voters to vote only on one day- and a work day at that? Why not have polling places open for a week or more, including over a weekend? And why don't we offer early voting for a period of several weeks before an election like several other states, including Ohio?

I can't imagine the difficulties and delays that would have been encountered at the polling place where I worked if voters were required to show photo identification. At a minimum, significant delays would have resulted. Without a doubt, some properly registered voters who have voted at the same polling place for years if not decades and were personally known by the election officials present would have been prevented from voting. It isn't hard to imagine that voters who are unhappy about being denied the right to vote might argue with election officials, and that such arguments might even escalate into violence.

If and when photo ID is required in a future election, we better make certain we've done everything possible to educate voters about these requirements over an extended period of time and have made it easy and simple for anyone who wants one to obtain an approved photo ID. Registered voters who are not listed as having one of the required forms of photo ID should be notified by their local election offices well in advance of the election that they will not be permitted to vote without such ID and instructed on how to obtain photo ID before the election. Political parties and other organizations interested in voter participation will need to follow up with registered voters to confirm they have obtained approved photo ID's before the election and to assist them in obtaining one if they have not.

Now that state election officials have acknowledged under oath that voter fraud is virtually nonexistent in Pennsylvania, only one conclusion can be drawn regarding the intentions of those who successfully advocated for the passage of Pennsylvania's photo ID law: they would prefer that those likely to have difficulty complying with a photo ID requirement- a significant number of the poor, the unemployed, the disabled, and the elderly- not be permitted to vote. Shame on them for pursuing a goal of preventing qualified registered voters from voting, and shame on us for allowing them to get away with it.

With the presidential election now over, we trial lawyers need to focus on the need for legitimate election reform in Harrisburg. Initially, we need to ensure that all registered voters are acutely aware of the new requirement and understand how to comply with it, and that the required photo ID is easily obtainable by all registered voters well in advance of the first election in which the requirement will be enforced. In the longer run, we need to push for the modernization of our antiquated and inefficient election system and for expanded voting opportunities such as keeping polling places open for a week or more, early voting and online voting. Our work will not be done until we've ensured that all citizens who are qualified to vote and wish to do so are able to vote without difficulty and guaranteed that their votes will be counted.

HOT OFF THE WIRE!

By: Chris Hildebrandt, Esq.

LEGISLATION

Adoption of the UIDDA in Pennsylvania will ease foreign litigant's burden in obtaining discovery from Pennsylvania residents.

Uniform Interstate Depositions and Discovery Act, Act 183 of 2012

The Uniform Interstate Depositions and Discovery Act ("UIDDA") took effect on December 24, 2012, and in doing so Pennsylvania joined 28 other states which have adopted the Act. The UIDDA replaces the former procedure necessary when foreign litigants sought discovery in Pennsylvania. Under the UIDDA, a foreign litigant presents his or her foreign subpoena to the prothonotary "in the jurisdiction in which the person who is the subject of the [subpoena] resides, is employed, or regularly transacts business in person. The prothonotary will then issue a Pennsylvania subpoena (incorporating the terms of the foreign subpoena) for service. Notably, requesting the issuance of a subpoena in Pennsylvania does not constitute a court appearance, so there is no need for admission *pro hac vice*.

Regional jurisdictions which have adopted the UIDDA include Delaware, Maryland, New York, Virginia, and Washington D.C.

THIRD CIRCUIT COURT OF APPEALS

It is not appropriate for an appellate court to grant a Writ of Mandamus where the trial court has imposed time limits regarding the presentation of argument and evidence at trial, even if the time limits are clearly objectionable.

In re: Arthur Baldwin, 700 F.3d 122 (Nov. 26, 2012)

In this case, 16 named Defendants were granted 7.5 hours in total to present their testimony and given 30 minutes for opening and closing statements. Defendants objected, asserting that each side would need eight days to put on its case. Defendants appealed, seeking a Writ of Mandamus to vacate the time-limit order.

The Third Circuit dismissed the appeal, finding that relief could be obtained by an ordinary appeal after trial. Defendants argued that it might be hard for them to identify prejudice from the trial time limits after the fact. This argument was rejected by the Third Circuit, noting that a "sine qua non" of mandamus is that the right to the relief sought be "clear and indisputable." The Third Circuit also disagreed that the time limits would effectively deprive Defendants of their right to a jury trial. The Court determined that the issues could not be properly analyzed until after trial, when Defendants could "identify with precision" what evidence they were unable to present because the clock had run out.

Although denying Defendants their requested relief, in a footnote the Third Circuit questioned "how either side in this complex case could possibly present the necessary evidence to a jury in 7.5 hours of trial time." The Court suggested that the District Court "re-examine the time-limit order to avoid the necessity of a re-trial."

SUPERIOR COURT OF PENNSYLVANIA

Where a wrongful death claim has been presented on behalf of an infant's parents, damages for loss of society and companionship are proper, even though the evidence supporting such damages may be "meager."

Hartwood v. Hospital of the University of Pennsylvania, 2012 PA Super 217 (Oct. 5, 2012)

This case stems out of the delivery and subsequent death of Hyseem Jacobs. Baby Jacobs was born via C-section and required immediate resuscitation due to hypoxic ischemic brain injury. Baby Jacobs died at the age of 17 months from related complications.

At trial, Plaintiffs were awarded over $2 million. Defendants' post-trial motions were denied. Two of the issues raised by Defendants on appeal concerned the propriety of whether it was proper for a jury to award certain wrongful death damages to Baby Jacobs' parents. Specifically, Defendants contended that there could be no recovery for non-pecuniary losses such as for society and companionship. Defendants also contended that such an award was improper due to a lack of evidence. The Superior Court rejected Defendants' contentions. First, the Court determined that a "jury is permitted to utilize the common inheritance of intelligent human beings in evaluating the meager evidence available regarding the value of the infant's life." In examining the evidence proffered by Plaintiffs, the Court noted that the father testified "to the existence of a close-knit family," that a brother testified that he helped care for Baby Jacobs and would play games with him. The Court determined that this "and other circumstantial evidence admitted at trial" was the best evidence available to Plaintiffs, thus sufficient to support the jury's award.

ALLEGHENY COUNTY, PA

A trial court denies a plaintiff due process where it allows an insurance company's attorney to fully participate in trial but

Continued on Page 19

HOT OFF THE WIRE! *… (Continued from Page 18)*

fails to permit the insurance company to be identified at trial.

Stepanovich v. McGraw, No. GD 10-16523 (Dec. 10, 2012) (O'Reilly, J.)

Stepanovich was struck by a vehicle operated by McGraw. Stepanovich filed suit against McGraw, also naming State Farm as the UM/UIM insurer. As described by the trial court:

In response to the logical application of the [Koken] case, in cases where the Tort-feasor and the insurance company were both sued, the insurance company defendant asked that it not be named or otherwise identified, yet be accorded full party status. Our Court here in Allegheny County accommodated the insurance companies and developed an Order which permitted the insurance company to remain a phantom and directed the trial judge to 'structure the trial in such a way as to accomplish this goal.'

At trial, the Court did not permit the disclosure of the insurance company yet permitted "double teaming" by both defense counsel. At trial, verdict was entered in favor of Defendants. The Court, upon consideration of post-trial motions, granted Plaintiff a new trial, concluding that it "had committed error in the way I handled the case and my complicity in denying due process" to Plaintiff. The Court continued, noting that "the practice of not identifying insurance carriers in motor vehicle cases to be the perpetuation of a myth that has outlived its usefulness." The Court concluded that "it is a denial of reality to pretend that insurance is not involved in every motor vehicle case."

5K WRAP-UP

By: Chris Miller, Esq.

The 12th annual President's Challenge 5K Run/Walk/Wheel race was held on Saturday, October 20, 2012. Approximately 200 participants took part in the race, enjoying a morning of exercise and giving back to the community.

WPTLA's own donation to the Pittsburgh Steelwheelers this year was $28,000, with a separate direct donation of $2500 contributed by a sponsor. The total amount raised and donated over the past 12 years exceeds $285,000.00, which is something that we should all be proud to have accomplished.

Thank you to all of our members who have donated so generously and given their time to this wonderful cause. I would also like to thank all of our members who actually participated in this year's event and who worked so hard to make it yet another success.

I would also like to thank all of our vendors who donated so generously once again this year. As I have stated before, I encourage our members to use the services of vendors who support our causes and to decline the services of vendors who don't contribute and support our causes. There is no reason to contribute to the financial gain of those companies and vendors who willingly choose not to support our efforts. Please feel free to contact me should if you wish to see a list of vendors who supported this year's event, as well as those vendors who declined their support of this year's event.

This year's event was bittersweet for me, as it will be my last year as the 5K Chairman. After 7 years, it is time for some new perspectives and ideas to be implemented with respect to the 5K. Sean Carmody, who co-chaired this year's event, will be taking the reigns as the Chairman next year. With the help and insight of Laurie Lacher, many new ideas were already implemented this year, such as on-line registration, new promotional ideas for the 5K and a new race day T-shirt design. I would encourage all of you to support Sean in this role so that future 5K's continue to grow and be even more successful than they have been to this point.

On behalf of WPTLA and the 5K committee members, thanks again to all of you who donated so generously and participated in this year's race. I can tell you firsthand that our efforts are truly appreciated by the members of the Pittsburgh Steelwheelers. We look forward to seeing all of you again at the 13th annual President's Challenge next year.

To view photos, go to http://www.wptla.org/pres_challenge5k.html and click on "Photos from the recent 5K Event".

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...Through the Grapevine

We wish a speedy recovery to **Past President John P. Goodrich**, who recently had ACL replacement surgery.

Junior Member Lauren Kelly has passed the bar and will begin employment with Reed Smith.

Member James R. Moyles has moved his Harrisburg office to 105 N Front St, Ste 210, Harrisburg 17101. His Pittsburgh office is still located in the Grant Bldg, Ste 2630. P: 412-281-1055 or 717-233-5400

Congratulations to **Board of Governors Member David M. Landay**, on his recent election to the Academy of Trial Lawyers of Allegheny County.

More congratulations to **Board of Governors Member Charles Alpern**, on the birth of his 8th grandchild, Wesley Alpern, born in August.

Welcome to new **Member Rebekah Siegel**, a 2012 graduate of Duquesne Law School, who has joined the firm of Edgar Snyder & Associates, in their Workers' Comp section.

Board of Governors Member Eric J. Purchase presented a critical perspective on Pennsylvania's proposed apology legislation at a November 2012 seminar for local physicians and attorneys in Erie, PA.